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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-807

CYLINDER GAS, CHEMICAL, PETROLEUM, AUTO-SERVICE AND ACCESSORY DRIVERS, MAINTENANCE, MECHANICS, HELPERS AND INSIDE EMPLOYEES LOCAL No. 283, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
Petitioner

vs.

OTTAWA SILICA COMPANY
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT OTTAWA SILICA COMPANY IN OPPOSITION

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OPINIONS BELOW

The Decision and Order of the National Labor Relations Board are reported at 197 NLRB No. 53 and are

printed in Appendix B, A.3-34, of the Petition. The Order of the Court of Appeals has not yet been officially reported, but is printed in Appendix A, A.1-2, of the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1973. The Petition for Writ of Certiorari was filed on November 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., §1254 (1).

QUESTION PRESENTED

Whether the Board properly concluded that the Ottawa Silica Company's lockout of employees and use of temporary replacements to continue operations did not violate Section 8(a)(1) and (3) of the Act (29 U.S.C., §158 (a)(1)(3)).

STATUTES INVOLVED

The statutory provisions involved are Sections 7, 8 (a)(1), 8 (a)(3), of the National Labor Relations Act, as amended, 28 U.S.C., §151, et seq. (referred to as the "Act"). They are printed in Appendix C, infra, A. 35.

STATEMENT OF THE CASE

Ottawa Silica Company, (hereinafter referred to as the "Employer"), is engaged in the mining, processing and distribution of silica sand at various locations throughout the United States, including its Rockwood, Michigan plant, the situs of the events giving rise to this litigation. Approximately 53% of the sand from the Rockwood, Michigan plant is sold to glass manufacturers who, because of the unique nature of their production methods and

facilities, rely on a continuous flow of sand shipments from the quarry. (A. 26)[1]

Relationships between suppliers of silica sand and their glass customers are long-term relationships since manufacturers have a great reluctance to change suppliers because of a virtual certainty that the new suppliers' sand will have different chemical properties. (A. 26) There is also pressure against changing suppliers which results from the reliability of a supplier in shipping and delivering sand. Supply reliability is an important factor. In fact, Owens-Illinois Glass Company, which is the Employer's Rockwood, Michigan plant's most important customer, announced to Guy W. Wolcott, the Employer's Vice President of Sales, that if the Employer should fail to meet the supply requirements of the Owens-Illinois' plant during a work stoppage, that plant would turn to a competing supplier. (A. 27)

Thus, the ramifications of a failure of the silica sand company to ship to its glass customers are legion and lethal. If the customer were to switch to a competing supplier, it would mean a permanent loss of that customer's business, or of at least a portion thereof, as a result of the trade practices commonly followed between the sand suppliers and their customers and of the reluctance of manufacturers to switch from one sand supplier to another.

In May of 1970, the Employer commenced contract renewal negotiations with the collective bargaining representative of its employees at the Rockwood, Michigan facility—namely, Cylinder Gas, Chemical, Petroleum. Auto Service and Accessory Drivers, Maintenance,

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[1] References are to Appendix B of the Petition.

Mechanics, Helpers and Inside Employees Local No. 283, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local No. 283"). As was stipulated at the hearing, the parties negotiated in good faith throughout the month of May. Towards the end of May, the Employer was confronted on various occasions with an imminent threat of a strike. (A. 23-24) Caught between this imminent threat of a strike which could occur at any time, and the demands of its customers, the Employer locked out its employees on June 1, 1970. On that day, the Employer commenced to operate the Rockwood, Michigan plant with supervisory staff personnel from the Rockwood, Michigan plant, and similar employees from the employer's Ottawa, Illinois plant as well as with some sales personnel. (A. 26) Production capacity during the lockout was limited almost exclusively to maintaining needs of glass manufacturing customers which needs amounted to approximately 53% of the Rockwood plant's pre-lockout production. The lockout was terminated on June 5, 1970. (A. 24) On the following day, however, employees met and voted to go on strike. During the strike of about five month's duration, the Employer continued to operate the plant just as it had during the preceding week.

A charge was filed by Local 283 alleging that the Employer had unlawfully locked out its employees and had operated its Rockwood, Michigan plant with replacements. After investigation, a complaint was issued and a hearing before a Trial Examiner was held. The Trial Examiner found that the Employer's lockout of its employees on June 1 was not a violation of the Act. He went on to hold, however, that the Employer's continued limited operations with supervisors and other nonbargaining unit employees was a violation of Section 8(a)(1) and (3) of

the Act. (A. 27-28) On July 24, 1971, the Employer filed Exceptions to the Trial Examiner's decision. On June 13, 1972, the Board issued its Decision and Order, finding that the Employer's conduct did not violate Sections 8(a)(1) and 8(a)(3). The majority of the Board concluded that the Employer's conduct had a comparatively slight impact on protected employee rights. (A. 9) The Board's decision was affirmed by the U.S. Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE WRIT

I. The Decision Reached Below Has Not Created a Conflict Between the Courts of Appeals.

The Petitioner contends that the decisions reached below has, in light of the decision of the U.S. Court of Appeals for the Seventh Circuit in *Inland Trucking Co.* v. *N. L. R. B,.* 440 F. 2d 562 (7th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971), created a conflict among the Courts of Appeals. In advancing this contention, the Petitioner construes the Inland Trucking decision as adopting the principle that an employer's use of temporary replacements during the course of a lockout of regular unit employees will in all cases amount to a *per se* violation of the Act.

The *Inland Trucking* decision can properly be read as avoiding the strict application of a *per se* theory of illegality. In concluding that the employer had violated the Act in engaging temporary replacements during a bargaining lockout, the Court in *Inland Trucking* apparently limited its holding to the "circumstances at bar", 440 F. 2d at 565. Such limitation of a decision to the circumstances in the case is inconsistent with the development of a *per se* theory — i.e., the conduct in question is illegal in all cases.

Furthermore, in *Inland Trucking,* the Court specifically inquired into the existence of any legitimate and substantial business justification for the employer's conduct — and found none. An inquiry into considerations of legitimate and substantial business justification is relevant only where the conduct in question is not *per se* illegal. As this Court stated in dicta in *N. L. R. B.* v. *Brown,* 380 U. S. 278 (1965), conduct which amounts to a *per se* violation, i.e., conduct "demonstrably destructive of employee rights", violates the Act even though evidence of legitimate and substantial business justification exists, 380 U.S. at 382. In making this inquiry and in finding no legitimate and substantial business justification for the employer's conduct in *Inland Trucking,* the Court, then, avoided the strict application of a *per se* rule. It would appear that it rested its decision, in part at least, on other than a *per se* approach. To this extent, then, no conflict among the Courts of Appeals has emerged.

CONCLUSION

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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